IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARILOU RICKERT, Respondent, v. STATE OF WASHINGTON, PUBLIC DISCLOSURE COMMISSION; and SUSAN BRADY, LOIS CLEMENT, EARL TILLY, FRANCIS MEARTIN and MIKE CONNELLY, members of the Public Disclosure Commission, Petitioners.	)	No. 77769-1 En Banc Filed October 4, 2007

J.M. JOHNSON, J.—The United States and Washington Constitutions both protect the right of free speech, and political speech is the core of that right. The notion that a censorship scheme like RCW 42.17.530(1)(a) may be

constitutionally enforced by a government agency erroneously "presupposes [that] the State possesses an independent right to determine truth and falsity in political debate." *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 624-25, 957 P.2d 691 (1998) (plurality opinion). Yet, "'[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.'" *Id.* at 625 (internal quotation marks omitted) (quoting *Meyer v. Grant*, 486 U.S. 414, 419, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988)). This court has previously agreed that state censorship is not allowed: "The State cannot 'substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.'" *Id.* at 626 (quoting *Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 791, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)). The present case provides an opportunity to vigorously reaffirm the law on this vital constitutional issue.

In *119 Vote No! Committee*, this court struck down former RCW 42.17.530(1)(a) (1988). That version of the statute prohibited any person from sponsoring, with actual malice, a political advertisement containing a false statement of material fact. The legislature subsequently amended the

statute to proscribe sponsoring, with actual malice, a political advertisement containing a false statement of material fact *about a candidate for public office*. Laws of 1999, ch. 304, § 2(1)(a). Like the Court of Appeals below, we conclude that the legislature's modification of the statutory prohibition fails to rectify its unconstitutionality.[1] RCW 42.17.530(1)(a), like its predecessor, is unconstitutional on its face. Accordingly, we affirm the Court of Appeals decision to reverse the trial court's order affirming enforcement of RCW 42.17.530(1)(a) against respondent Marilou Rickert.

While other states have enacted statutes like RCW 42.17.530(1)(a),[2] and some courts have upheld these statutes,[3] such holdings should be neither

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[1] *See Rickert v. Pub. Disclosure Comm'n*, 129 Wn. App. 450, 119 P.3d 379 (2005).

[2] At present, 14 states have laws similar to RCW 42.17.530(1)(a). Six of these statutes are virtually identical. *See* Colo. Rev. Stat. Ann. § 1-13-109 (LexisNexis); Fla. Stat. Ann. § 104.271 (West); Minn. Stat. Ann. § 211B.06 (West); Mont. Code Ann. § 13-37-131 (LexisNexis); Ohio Rev. Code Ann. § 3517.21 (LexisNexis); Or. Rev. Stat. Ann. § 260.532. The eight remaining statutes are more stringent than Washington's law in certain respects. Six of these laws require the person to act "knowingly," *see* Mass. Gen. Laws Ann. ch. 56, § 42 (West); N.D. Cent. Code § 16.1-10-04 (LexisNexis); Tenn. Code Ann. § 2-19-142 (Lexis/Nexis); Utah Code Ann. § 20A-11-1103 (LexisNexis); W. Va. Code Ann. § 3-8-11 (LexisNexis); Wis. Stat. Ann. § 12.05 (West), while two require that the false statements also be defamatory or constitute fighting words. *See* Miss. Code Ann. § 23-15-875; N.C. Gen. Stat. Ann. § 163-274(8) (Lexis/Nexis).

[3] *See, e.g., Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991) (upholding, in part, former Ohio Rev. Code Ann. § 3599.09.1(B)(1) (renumbered Ohio Rev. Code Ann. § 3517.21 (LexisNexis)).

admired nor emulated. The notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment. Because RCW 42.17.530(1)(a) rests on the validity of this erroneous assumption, it must be struck down.

Facts and Procedural History

In 2002, Ms. Rickert challenged incumbent Senator Tim Sheldon in the election for state senator from Washington's 35th Legislative District. During the campaign, Ms. Rickert sponsored a mailing that included a brochure comparing her positions to those of Senator Sheldon. In part, the brochure stated that Ms. Rickert "[s]upports social services for the most vulnerable of the state's citizens." Admin. Record (AR) at 10. By way of comparison, the brochure stated that Senator Sheldon "voted to close a facility for the developmentally challenged in his district." *Id.* In response to the latter statement, Senator Sheldon filed a complaint with the Public Disclosure Commission (PDC), alleging a violation of RCW 42.17.530(1)(a).

RCW 42.17.530(1) provides, in relevant part:

> It is a violation of this chapter for a person to sponsor with actual malice:
>
> (a) Political advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office. However, this subsection

> (1)(a) does not apply to statements made by a candidate or the candidate's agent about the candidate himself or herself.

"Actual malice" means "to act with knowledge of falsity or with reckless disregard as to truth or falsity." RCW 42.17.020(1). A violation of RCW 42.17.530(1)(a) must be proven by clear and convincing evidence. RCW 42.17.530(2).

The PDC held a hearing regarding Senator Sheldon's complaint on July 29, 2003, months after Senator Sheldon handily defeated Ms. Rickert in the 2002 election. *See Rickert v. Pub. Disclosure Comm'n*, 129 Wn. App. 450, 453, 119 P.3d 379 (2005) (noting that "Senator Sheldon was reelected . . . by approximately 79 percent of the vote"). The PDC found that Ms. Rickert's brochure contained two false statements: "(a) Senator Sheldon voted to close the Mission Creek Youth Camp, and (b) . . . Mission Creek was a facility for the developmentally challenged." AR at 410 (Final Order, Conclusion of Law 7).[4] Additionally, the PDC concluded that the statements were material, that Ms. Rickert sponsored the brochure with actual malice, and that her violation of RCW 42.17.530(1)(a) had been established by clear and

[4] A finding of fact erroneously denominated as a conclusion of law will be treated as a finding of fact. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006).

convincing evidence. AR at 411 (Final Order, Conclusion of Law 10). The PDC imposed a $1,000 penalty on Ms. Rickert. AR at 411 (Final Order).

The superior court affirmed the PDC's final order. Ms. Rickert then appealed to the Court of Appeals, which reversed. The Court of Appeals held that RCW 42.17.530(1)(a) violates the First Amendment because it cannot survive strict scrutiny. *Rickert*, 129 Wn. App. 450. We agree and, accordingly, affirm.

Analysis

A. RCW 42.17.530(1)(a) extends to protected speech, hence, strict scrutiny applies

"'[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.'" *Burson v. Freeman*, 504 U.S. 191, 196, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992) (plurality opinion) (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989)). Such political speech is "'at the core of our First Amendment freedoms.'" *Republican Party v. White*, 536 U.S. 765, 774, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002) (quoting *Republican Party v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2001)). Accordingly, any statute that purports to regulate such speech based

on its content is subject to strict scrutiny. *Id.*; *Burson*, 504 U.S. at 198 (state's content-based regulation of political speech subject to strict scrutiny); *119 Vote No! Comm.*, 135 Wn.2d at 628; *Rickert*, 129 Wn. App. at 452.[5] Under this standard, the State must demonstrate that RCW 42.17.530(1)(a) "'is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson*, 504 U.S. at 198 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)).

The text of RCW 42.17.530(1)(a) suggests that the legislature may have intended to limit the scope of its prohibition to the unprotected category of political defamation speech identified by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). However, as correctly noted by the Court of Appeals, "[U]nder *New York Times*, only *defamatory* statements . . . are not constitutionally protected speech." *Rickert*, 129 Wn. App. at 461. Because RCW 42.17.530(1)(a) does not require proof of the defamatory nature of the statements it prohibits, its reach is not limited to the very narrow category of

[5] The State conceded this point in one brief. Resp't's Ct. of Appeal Br. at 24.

unprotected speech identified in *New York Times* and its progeny. Thus, RCW 42.17.530(1)(a) extends to protected political speech and strict scrutiny must apply.

B. RCW 42.17.530(1)(a) cannot survive strict scrutiny

1. Protecting candidates is not a compelling government interest here, and RCW 42.17.530(1)(a) is not narrowly tailored to further that interest

The plain language of RCW 42.17.530(1)(a) provides that the law's purpose is "to provide protection for candidates for public office." Laws of 1999, ch. 304, § 1(3). Legislators apparently concluded this was a sufficient state interest to support the statute based on the concurring opinion of Justice Madsen in *119 Vote No! Committee*, 135 Wn.2d at 635-36 (Madsen, J., concurring). Laws of 1999, ch. 304, § 1. The present case provides an opportunity to reiterate the fundamental principles enunciated by the lead opinion in *119 Vote No! Committee*, 135 Wn.2d 618, and to clarify that neither statements about political issues nor those about candidates may be censored by the government under a scheme like RCW 42.17.530(1)(a).

In the case at bar, as in *119 Vote No! Committee,* the State claims that "it may prohibit false statements of fact contained in political

advertisements." 135 Wn.2d at 624. However, "[t]his claim presupposes the State possesses an independent right to determine truth and falsity in political debate," a proposition fundamentally at odds with the principles embodied in the First Amendment. *Id.* at 624-25. Moreover, it naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech. Yet, political speech is usually as much opinion as fact.[6] As aptly summarized by the Supreme Court, quoted by the lead opinion in *119 Vote No! Committee*, "'[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us.'" *Id.* at 625 (internal quotation marks omitted) (quoting *Meyer*, 486 U.S. at 419-20).

Particularly relevant here is the fundamental First Amendment principle forbidding censorship or coerced silence in the context of political debate. "The First Amendment exists precisely to protect against laws . . . which suppress ideas and inhibit free discussion of governmental affairs." *Id.* at 627; *see also White,* 536 U.S. at 774 (political speech is "'at the core of our First Amendment freedoms'" (quoting *Kelly*, 247 F.3d at 861)). Hence, the

[6] "Spinning" is a common term used to describe putting different perspectives on facts.

Sedition Act of 1798, which censored speech about government, has been subject to nearly unanimous historical condemnation. *See, e.g., New York Times*, 376 U.S. at 274. For similar reasons, RCW 42.17.530(1)(a) is deserving of condemnation, lacks a compelling justification, and thus must be declared unconstitutional.

In her concurrence in *119 Vote No! Committee*, Justice Madsen appeared to suggest (in dicta) that while false statements in political speech about issues may not be constitutionally prohibited, the State may prohibit such statements about candidates. 135 Wn.2d at 635 (Madsen, J., concurring). This was not an accurate statement of the law to the extent that it suggested nondefamatory, false statements about candidates may be prohibited.[7] More importantly, in light of the heightened protections for

[7] The Supreme Court has indicated that false statements about private individuals made with actual malice, but which are not defamatory, may not be protected speech. *See Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967). However, the Court has not held that false statements about public figures made with actual malice, but which are not defamatory, are devoid of all constitutional protection. All of the Court's assertions that calculated falsehoods about public officials or figures lack constitutional protection have been made in the context of suits involving defamation. *See Herbert v. Lando*, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Thus, the statements deemed unprotected speech in the above cases were all defamatory, as well as false. Hence, none of the above cases are determinative as to the constitutional protection afforded false but nondefamatory

political speech afforded by the First Amendment, there simply cannot be any legitimate, let alone compelling, interest in permitting government censors to vet and penalize political speech about issues *or* individual candidates.

The Supreme Court has recognized a legitimate, and at times compelling, interest in "compensating private individuals for wrongful injury to reputation." *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 348, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). However, this interest cannot justify a government-enforced censorship scheme like RCW 42.17.530(1)(a). *See 119 Vote No! Comm.*, 135 Wn.2d at 630 ("RCW 42.17.530(1)(a) restricts political speech absent the compelling interest present in defamation cases . . . ."). Enforcement of RCW 42.17.530(1)(a) has nothing to do with "compensating private individuals for wrongful injury to reputation." *Gertz*, 418 U.S. at 348. The statute may protect candidates from criticism, but it has no mechanism for compensation for damage to reputations. More importantly, there is no requirement that the statements subject to sanction under RCW 42.17.530(1)(a) be of the kind that tend to cause harm to an individual's reputation, i.e., defamatory.[8] Ultimately, the statute bears no

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statements like those at issue in this case.

[8] "A communication is defamatory if it tends so to harm the reputation of another as to

relationship to the reputational interests that Justice Madsen considered in suggesting that former RCW 42.17.530(1)(a) might be valid as applied to speech about candidates. *119 Vote No! Comm.*, 135 Wn.2d at 635-36 (Madsen, J., concurring).

In sum, the interest asserted by the legislature—protecting political candidates (including themselves)—is not a compelling interest in support of RCW 42.17.530(1)(a). Accordingly, the statute fails under strict scrutiny.

Moreover, even assuming that protection of political candidates could be a compelling interest, RCW 42.17.530(1)(a) would still be unconstitutional because there is no requirement that the prohibited statements tend to be harmful to a candidate's reputation, i.e., defamatory. Thus, the statute is not narrowly tailored to serve the State's asserted interest in protecting candidates.

2. Preserving the integrity of elections is not a compelling government interest here, and RCW 42.17.530(1)(a) is not narrowly tailored to further that interest

At argument below and before this court, the PDC suggests that preserving the integrity of the election process is the primary government

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lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977).

interest furthered by RCW 42.17.530(1)(a). However, this was not the interest asserted by the legislature in enacting RCW 42.17.530(1)(a). Laws of 1999, ch. 304, § 1, quoted *supra* p. 6. Under strict scrutiny, a law burdening speech may not be upheld for any conceivable purpose but must be evaluated according to its actual purpose. Thus, it is arguably inappropriate to even consider the PDC's argument based on this belated, alternative interest.

Even assuming it were proper to consider a state interest asserted for the first time at argument, the PDC's claim still fails. The government may have a compelling interest in preventing direct harm to elections. *See*, *e.g.*, *Burson*, 504 U.S. at 199 (recognizing states' compelling interest in "'preserving the integrity of its election process'" by protecting the election poll area (quoting *Eu*, 489 U.S. at 231)); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986) (recognizing states' compelling interest in avoiding voter confusion through avoiding ballot overcrowding by multiple candidates with little support). However, that interest is not advanced in any significant manner by prosecuting Ms. Rickert, and other similarly situated individuals, under RCW 42.17.530(1)(a). Rather,

the PDC's claim that it must prohibit arguably false, but nondefamatory, statements about political candidates to save our elections conflicts with the fundamental principles of the First Amendment. *See supra* Part B.1. Therefore, "preserving the integrity of the election process" cannot be deemed a compelling interest in the context of a scheme like RCW 42.17.530(1)(a).

Furthermore, even if such an interest were valid, RCW 42.17.530(1)(a) would remain unconstitutional because it is not narrowly tailored. The statute is underinclusive because it does not apply to many statements that pose an equal threat to the State's alleged interest in protecting elections. Specifically, the statute exempts all statements made by a candidate (or his supporters) about himself. RCW 42.17.530(1)(a). Basically, a candidate is free to lie about himself, while an opponent will be sanctioned. Yet, "[t]he PDC presents no compelling reason why a candidate would be less likely to deceive the electorate on matters concerning him- or herself and [thus] compromise the integrity of the elections process." *Rickert*, 129 Wn. App. at 466.

This exemption cannot be justified as an example of the legislature

choosing to focus on a particularly egregious form of unprotected speech. *Cf. Virginia v. Black*, 538 U.S. 343, 363, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (upholding state statute criminalizing cross burning with intent to intimidate, in part, because proscribed conduct constituted "particularly virulent form of" a threat). Because the entire class of speech at issue is not proscribable, *see supra* Part A., the reasoning from cases like *Black*, 538 U.S. 343, and *R. A. V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), is inapplicable. Additionally, the very existence of the exemption for self-related speech undermines the legitimacy of the State's asserted interest. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) (noting that exemptions "may diminish the credibility of the government's rationale for restricting speech in the first place"). This exemption suggests that the interest proffered by the legislature—protecting candidates (including themselves)—is the true interest behind this law, not protection of the electoral process.

In sum, RCW 42.17.530(1)(a)'s exemption for candidates' false speech about themselves demonstrates that the statute is not narrowly tailored to serve the State's alleged interest in preserving the integrity of elections.

See ACLU v. Heller, 378 F.3d 979, 996-97 (9th Cir. 2004) (finding Nevada law proscribing anonymous campaign speech not narrowly tailored to further state's interest in fraud prevention because, among other things, the statute contained exceptions for communications by candidates and political parties). Because RCW 42.17.530(1)(a) is not narrowly tailored, the statute cannot survive under strict scrutiny.

3. The faulty procedural mechanisms of RCW 42.17.530(1)(a) confirm that the law is not narrowly tailored and, thus, fails under strict scrutiny

RCW 42.17.530(1)(a) is also fatally flawed due to its enforcement procedures, which are likely to have a chilling effect on speech. These procedural defects further indicate that the statute is not the least restrictive alternative to achieve the compelling interests it allegedly furthers. Ultimately, these defects support the conclusion that any statute permitting censorship by a group of unelected government officials is inherently unconstitutional.

The members of the PDC, the administrative body that enforces RCW 42.17.530(1)(a), are appointed by the governor, a political officer. *See* RCW 42.17.350(1). This group of unelected individuals is empowered not only to

review alleged false statements made in political campaigns but also to impose sanctions. *See* WAC 390-37-100. Finally, there is no requirement that a reviewing court conduct an independent, de novo review as to whether there is clear and convincing evidence the respondent uttered the statements with actual malice.[9] *Cf. Bose Corp. v. Consumers Union*, 466 U.S. 485, 514, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (holding that, under the standard of *New York Times*, "[a]ppellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity").

The chilling effects resulting from this procedural scheme are manifest. A sitting governor may appoint a majority of the PDC's members. When this same governor seeks reelection, the governor's own appointees will decide whether to sanction the speech of campaign opponents. The campaign opponents will not be guaranteed a jury trial or independent, de novo judicial review. The mere threat of such a process will chill political speech. Likewise, the prospect of such a proceeding justifiably undermines the

[9] While such a review was conducted in this case, it is not mandated by statute. Thus, under RCW 42.17.530(1)(a), the speaker bears the burden of seeking out, and paying for, vindication in the courts whenever the PDC erroneously finds a violation. Review up to and including this court is expensive, protracted, and burdensome.

public's confidence in the propriety of Washington's electoral process—the very interest which the PDC purports to serve. Because of the risks to liberty inherent in RCW 42.17.530(1)(a)'s enforcement mechanisms, the statute cannot survive strict scrutiny.

Conclusion

Our constitutional election system already contains the solution to the problem that RCW 42.17.530(1)(a) is meant to address. "In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of 'more speech, not enforced silence,' thus has special force." *Brown v. Hartlage*, 456 U.S. 45, 61, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (quoting *Whitney v.* California, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring)). In other words, the best remedy for false or unpleasant speech is more speech, not less speech. The importance of this constitutional principle is illustrated by the very real threats to liberty posed by allowing an unelected government censor like the PDC to act as an arbiter of truth. *See supra* Part B.2.

In the case at bar, Ms. Rickert made knowingly false or reckless

statements about Senator Sheldon, a man with an outstanding reputation. Senator Sheldon and his (many) supporters responded to Ms. Rickert's false statements with the truth. As a consequence, Ms. Rickert's statements appear to have had little negative impact on Senator Sheldon's successful campaign and may even have increased his vote. *See Rickert*, 129 Wn. App. at 453 (noting that "Senator Sheldon was reelected . . . by approximately 79 percent of the vote."). Were there injury to Senator Sheldon's reputation, compensation would be available through a defamation action. As it is, Ms. Rickert was singled out by the PDC for punishment, six months after the election, based on statements that had no apparent impact on the government interests allegedly furthered by the statute. That the statute may be applied in such a manner proves that it is fatally flawed under the First Amendment.

There can be no doubt that false personal attacks are too common in political campaigns, with wide-ranging detrimental consequences. However, government censorship such as RCW 42.17.530(1)(a) is not a constitutionally permitted remedy. We hold that this statute, which allows a government agency to censor political speech, is unconstitutional and affirm the decision of the Court of Appeals.

AUTHOR:
Justice James M. Johnson

WE CONCUR:

Justice Charles W. Johnson

Justice Susan Owens

Justice Richard B. Sanders